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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1428

ANTHONY M. PUCHALSKI,
Petitioner,

vs.

NEW JERSEY STATE PAROLE BOARD,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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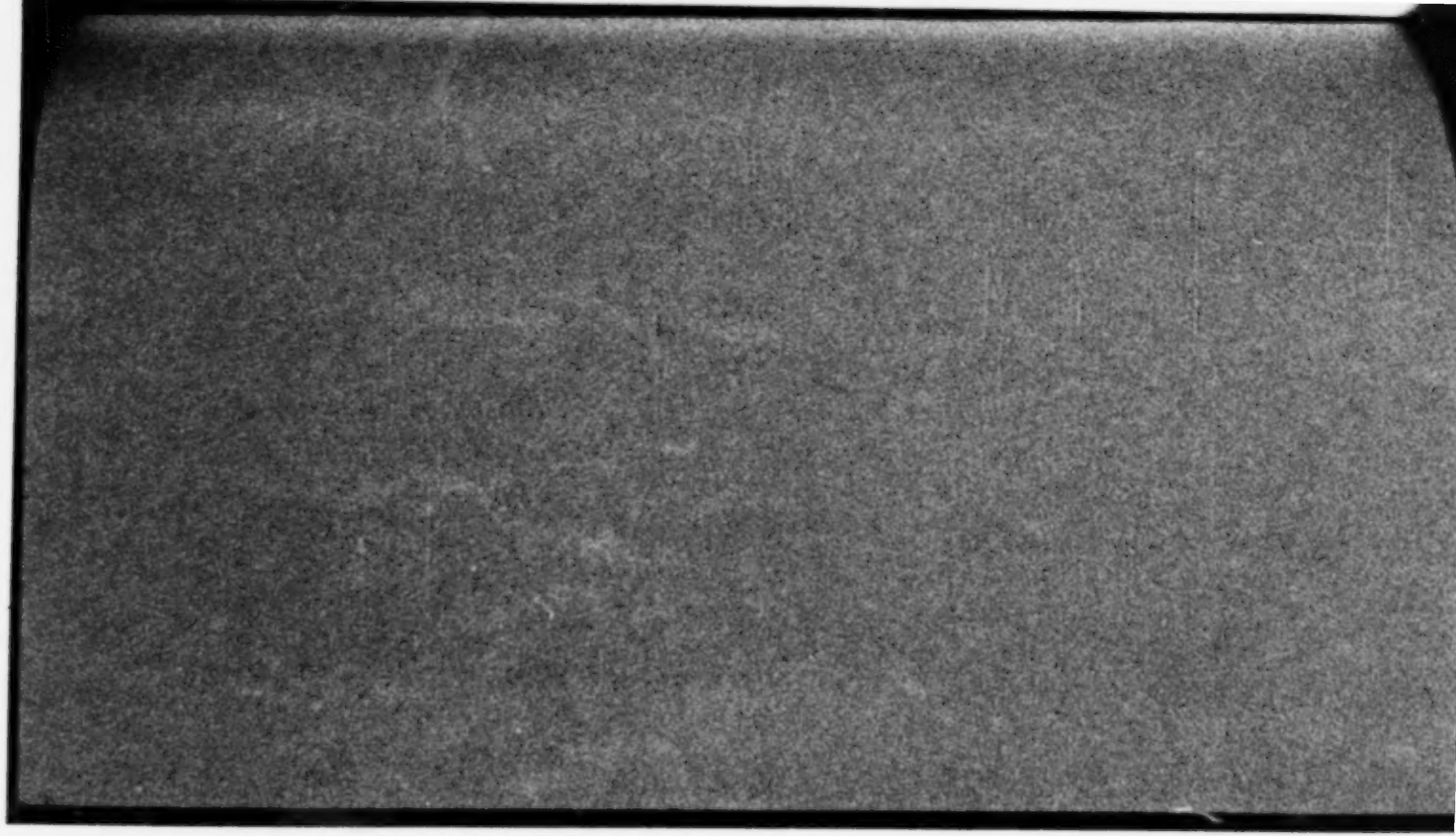

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented	1
Counter-Statement of the Case	1
Reasons for Not Granting Writ	3
I. The Decision Below is Clearly Correct	3
II. There is no Conflict of Decisions	5
III. There is no Important Question of Federal Law	10
Conclusion	15

Cases Cited

Anders v. California, 386 U. S. 748 (1967)	7
Boddie v. Weakley, 356 F. 2d 242 (4th Cir., 1966)	8
Boggess v. Boles, 251 F. Supp. 689 (N. D. W. Va., 1966)	7
Commonwealth v. Tinson, 249 A. 2d 549 (1969)	10
Donnell v. Swenson, 302 F. Supp. 1024 (W. D. Mo., 1969)	6
Douglas v. California, 372 U. S. 353 (1963)	2, 5
Earnest v. Willingham, 406 F. 2d 681 (10th Cir., 1969)	9
Escoe v. Zerbst, 295 U. S. 490 (1935)	13
Gardner v. California, 393 U. S. 367 (1969)	2, 5
Goldberg v. Kelly, —— U. S. ——, 38 U. S. Law Week 4223 (Mar. 24, 1970)	6

PAGE

Griffin v. Illinois, 351 U. S. 12 (1956) 2, 5, 7

Hodge v. Markley, 339 F. 2d 973 (7th Cir., 1965) 13

Hoffman v. State of Alaska, 404 P. 2d 644 (1965) 8

Hyser v. Reed, 318 F. 2d 225 (D. C. Cir.), Cert. denied 374 U. S. 957 (1963) 8

In Re Gault, 387 U. S. 1 (1967) 7

Johnson v. Stucker, 203 Kan. 253, cert. denied, 38 U. S. Law Week 3173 (Nov. 10, 1969) 10, 13, 14

Jones v. Rivers, 338 F. 2d 862 (4th Cir., 1964) 9

Lane v. Brown, 372 U. S. 477 (1963) 5

Mempa v. Rhay, 389 U. S. 128 (1967) 2, 4, 8, 9

Roberts v. LaVallee, 389 U. S. 40 (1967) 6

Townsend v. Burke, 334 U. S. 736 (1948) 7

United States ex rel Vance v. Kenton, 252 F. Supp. 344 (D. Conn., 1966) 9

United States ex rel Wilson v. McCann, 408 F. 2d 896 (2d Cir., 1969) 6

Washington v. Hagan, 287 F. 2d 332 (3rd Cir., 1960) cert. denied, 366 U. S. 970 ..... 12, 13

Wilkerson v. Patterson, 303 F. Supp. 665 (D. Col., 1969) 9

Williams v. City of Oklahoma City, 395 U. S. 458 (1969) 8

Williams v. New York, 337 U. S. 241 (1949) 7

Williams v. Patterson, 389 F. 2d 374 (10th Cir., 1968) 9

PAGE

United States Constitution Cited

Sixth Amendment 6

Fourteenth Amendment 2

Statutes Cited

N.J.S.A. 2A:158A-1 1

N.J.S.A. 30:4-123.14 ..... 13, 14

N.J.S.A. 33:4-123.25 ..... 1, 3

Counter-Statement of Question Presented

Does the Constitution require that New Jersey supply an indigent parole applicant with the limited attorney representation now permitted by N.J.S.A. 30:4-123.25, namely, consultation with counsel prior to the parole hearing "if he feels his legal rights are invaded" and submission of a brief on his behalf to the Parole Board if the Board consents to receive it?

Counter-Statement of the Case

Petitioner is serving a sentence of 29 to 30 years on conviction of homicide, having been found guilty in the appropriate criminal court of Bergen County, New Jersey and he was received in the New Jersey State Prison on December 14, 1962. He first became eligible for parole consideration, and was heard by the State Parole Board, on February 20, 1968. Parole was denied and he was scheduled for rehearing for February, 1970.

Plaintiff then appealed to the Appellate Division of the Superior Court of New Jersey. He named the New Jersey State Parole Board as defendant in the action seeking to challenge the propriety of its refusal to assign counsel to him or to arrange for assignment of counsel to him so that such counsel might consult with petitioner prior to his Parole Board hearing and file any legal documents contemplated by N.J.S.A. 30:4-123.25.

The Parole Board had notified petitioner that it had no authority to make such appointment or assignment of counsel for him and petitioner indicates that he made a similar request to the office of the Public Defender of the State of New Jersey and was informed by that office that the statute authorizing the office of Public Defender (N.J.S.A. 2A:158A-1 *et seq.*) did not authorize a Public Defender to represent petitioner under the circumstances

in this case. Additionally, the Public Defender informed petitioner that there was no provision in the law for personal appearance by counsel at a Parole Board hearing relating to the grant of parole, and for this reason, counsel would not be assigned.

The Appellate Division affirmed the decision of the Parole Board which had denied parole and which had refused to assign counsel, holding that an indigent prisoner was not entitled to assignment of counsel at public expense to assist him in making a plea for parole under any New Jersey statutory or rule authority. It also found no merits to petitioner's contention that the New Jersey statute constituted a denial of equal protection of the laws and due process of laws under the Fourteenth Amendment of the United States Constitution and held that the United States Supreme Court's cases dealing with the rights of indigents at various stages in criminal cases, represented by *Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Douglas* v. *California,* 372 U. S. 353 (1963); *Gardner* v. *California,* 393 U. S. 601 (1969) and *Mempa* v. *Rhay,* 389 U. S. 128 (1967), were distinguishable.

The petitioner then filed an appeal to the Supreme Court of New Jersey, which rendered its decision on December 16, 1969. That Court affirmed the judgment of the Appellate Division of the New Jersey Superior Court for the reasons given in its opinion, finding that the aid of counsel in seeking a parole is not of such importance, and does not concern the determination of such factual or legal questions, as to require the State to supply an attorney to those unable to pay for one, and that consequently no constitutional right of plaintiff had been infringed.

This petition for a writ of certiorari followed.

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Reasons for not Granting the Writ

This case does not warrant review by this court on Certiorari for any one of the traditional reasons.

I

The Decision Below is Clearly Correct

The present petition seeks to convert a correct decision in a simple parole application case into a Supreme Court case based on prior decisions relating to the rights of defendants in criminal prosecutions and probation revocation hearings which are tantamount to resentencings or deferred sentencings.

In New Jersey there is no right to counsel at a parole request hearing and the statute, N.J.S.A. 30:4-123.25 merely provides as follows (emphasis added by Court below):

> "When it becomes necessary for a prisoner to appear before the board, either for the purpose of determining his fitness for parole or to afford him an opportunity to be heard as to revocation of parole, such hearing shall be conducted in accordance with the rules and regulations of the board, but the prisoner shall have the right to consult legal counsel of his own selection, *if he feels that his legal rights are invaded,* and *subject to the consent of the board* to submit in writing a brief *or other legal argument* on his behalf to the parole board, and to have the services of an interpreter at his hearing if such services are necessary. The board, however, may call before it such witnesses as it may deem necessary and proper and in order to compel their attendance, shall be vested with the power of subpoena * * *."

Petitioner was granted a parole hearing and was fully heard by the Parole Board, and the Board declined to parole him. He does not contend that there is any statutory or court rule authority for the assignment of counsel by the Parole Board or by any other agency to assist prisoners at the hearings of their application for parole. He also does not urge that the due process clause of the Fourteenth Amendment requires the assistance of counsel in connection with Parole Board determinations. He simply asserts that since he was financially unable to hire counsel for the mere consultative purposes permitted by the statute and the State would not provide same for him at public expense, this constituted a denial of equal protection of the laws.

The State Court below found that the aid of counsel in seeking a parole is not of such importance and does not concern the determination of such factual or legal questions as to require the State to supply an attorney to those unable to pay for one, and that consequently no constitutional right of plaintiff had been infringed merely because no attorney had been assigned to assist him in making a plea for parole. The court held that this court's decision in *Mempa* v. *Rhay,* 389 U. S. 128 (1967) was distinguishable from the case *sub judice.* It held that *Mempa* did not affect proceedings to grant parole, since that case dealt with representation at a combined probation revocation and sentencing proceeding. The Court found that the situation presented at a hearing to grant parole is readily distinguishable from the revocation of probation proceedings considered in *Mempa,* because in the former, a conditional freedom is being granted to a prisoner by the administrative board, based on a largely discretionary application of its expertise; that the factors deemed important in *Mempa* have passed, since sentence has already been imposed, the prisoner has

had an opportunity to present evidence to a court, with the advice of counsel, as to its appropriate limits, and there are no substantial legal rights which the prisoner can lose by not exercising them at the parole hearing. The court was also very careful to consider and distinguish the holding of this Court in the line of cases represented by *Griffin* v. *State of Illinois,* 351 U. S. 12 (1956); *Lane* v. *Brown,* 372 U. S. 477 (1963); *Gardner* v. *California,* 393 U. S. 367 (1969); *Douglas* v. *California,* 372 U. S. 353 (1963), etc. The court held that the aid of counsel in seeking a parole is not of such importance that the State should be required to furnish counsel for this purpose to those who cannot afford to pay for it, being careful to note that the New Jersey statute does not provide for the appearance of counsel *at* the hearing and that the most that the statute grants as a "right" is that a prisoner may consult with counsel prior to the hearing where he feels that his legal rights are invaded, and to have a brief submitted on his behalf if the Board consents.

It is respectfully submitted that this conclusion is sound and that the court below correctly analyzed both the facts and the law involved in the case.

II

There is no Conflict of Decisions

There are no decisions contrary to the decision in the instant case. Petitioner has been unable to cite a single decision, from anywhere in the United States, which will lend support to his contentions. In fact, none of the cases he relies on relates to the right to counsel at a parole hearing, let alone the right to consult counsel before a parole hearing in the very limited sense in which it is permitted by the New Jersey statute being considered.

For the convenience of the court we will analyze the citations set forth in petitioner's brief. With the exception of *Goldberg* v. *Kelly,* U. S. 38 Law Week 4223 (1970), which held that prior to terminating a recipient's public assistance payments, a State should afford the recipient an opportunity for an evidentiary hearing, all of the other decisions set forth by petitioner relate to the rights of indigent defendants in connection with various aspects of criminal law proceedings which may ultimately lead to their incarceration or reincarceration in a penal institution, including the stages of preliminary hearing, arraignment, trial (whether relating to an adult or a juvenile), sentencing, appeal, or revocation proceedings relating to the revocation of probation or the revocation of parole which will result in the resentencing or recarceration of the defendant. None of the situations covered by the various cases cited related to an administrative parole hearing as is the subject matter of the instant litigation.

Some of the cases cited relate to the very early stages of criminal prosecution. Thus, *Roberts* v. *LaVallee,* 389 U. S. 40 (1967) held that the New York statute denying a free transcript to an indigent, of a preliminary hearing at which major state witnesses had testified, violated equal protection of the law; *Donnell* v. *Swenson,* 302 F. Supp. 1024 (W. D. Mo., 1969) held that a State prisoner's rights under the Sixth Amendment were violated because he was arraigned in the State Court in the absence of counsel.

The next line of cases cited by petitioner relate to various rights at a criminal trial itself. In *Wilson* v. *McCann,* 408 F. 2d 896 (2nd Cir., 1969) it was held that the denial of petitioner's application, before the start of his second trial, for that portion of the transcript of the first trial which had contained testimony of undercover agents who had made alleged purchases of nar-

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cotics from him, deprived him of equal protection of the law. Petitinoer also cites *In re Gault,* 387 U. S. 1 (1967) which held that juvenile delinquency proceedings, which might lead to commitment of the juvenile, must measure up to essential standards of due process.

He then cites cases dealing with a person's rights at sentencing following conviction. *Boggess* v. *Boles,* 251 F. Supp. 689 (N. D. W. Va., 1966) held that a State prisoner is entitled to habeas corpus relief where his attorney had not been present at the sentencing, unless resentencing in proper fashion were to follow. *Townsend* v. *Burke,* 334 U. S. 736(1948) held that where defendant had been convicted upon his plea of guilty, and was not represented by counsel, and where the court when considering sentence actually considered prejudicial material which was either misinformation on the part of the prosecutor, relating to the inmate's prior criminal record or the result of the court's own careless reading of the record, the individual was denied due process. *Williams* v. *New York,* 337 U. S. 241 (1949) held that due process does not require that a person convicted after a fair trial be confronted with, and be permitted to cross examine, witnesses as to his prior criminal record considered by the Judge in determining the sentence, and this, even though the jury recommends life imprisonment and the judge imposes the death sentence.

The next group of decisions he sets forth pertains to appeals from conviction. *Griffin* v. *Illinois,* 351 U. S. 12 (1956) is, of course, this Court's land-mark decision establishing the right of an indigent to a transcript for him to utilize in connection with the appeal from his sentence. *Anders* v. *California,* 386 U. S. 738 (1967) was an opinion by this Court dealing with the anomalous situation wherein the Court was required to rule that on an indigent's first appeal, his court appointed counsel must support him

to the best of his ability, should request permission to withdraw only if he finds the case to be wholly frivolous. in which event he must file a brief referring to anything in the record which might arguably support the appeal. *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969) held that the decision denying any right of appeal to the defendant, despite a statute providing for an appeal as a matter of right, by enforcing that right only for defendants able to pay for the preparation of a transcript, violated equal protection of the laws.

Petitioner then refers to cases dealing with either probation revocation hearings or parole revocation hearings. In connection with probation revocations he cites *Mempa* v. *Rhay,* 389 U. S. 128 (1967), wherein this court held that an attorney must be afforded at the combined probation-revocation and sentencing proceeding conducted by the State of Washington; likewise, *Hoffman* v. *Alaska,* 404 P. 2d 644 (1965) held that an indigent is entitled to counsel at probation revocation proceedings.

Finally, he attempts to rely on various conflicting decisions relating to parole revocation hearings as follows: First, he sets forth various decisions which actually hold that a defendant is *not* entitled to counsel at parole revocation hearings. In *Boddie* v. *Weakley,* 356 F. 2d 242 (4th Cir., 1966) it was held that no constitutional right of the prisoner was denied in a hearing before the District of Columbia parole board dealing with the revocation of his mandatory release, where he waived the right to counsel and readily admitted everything with which he was charged including the fact that he had assaulted his girlfriend. The court there was careful to note that it had previously held that a prisoner is not entitled to the services of appointed counsel in a routine parole revocation hearing before that parole board. *Hyser* v. *Reed,* 318 F. 2d 225 (D. C. Cir., 1963), *cert. den.* 375 U. S. 957 (1963),

held, *inter alia,* that the due process clause does not require the appointment of counsel for indigent parolees, to conduct adversary hearings in the nature of a non-jury trial, to cross-examine sources of information, to have discovery of the parole board's files or compulsory process. *Jones* v. *Rivers,* 338 F. 2d 862 (4th Cir., 1964) held that the District of Columbia parole board is not a judicial body and has no right, statutory or otherwise, to appoint an attorney to represent a parolee at a revocation hearing. The court said "freedom on parole from confinement in a penal institution prior to serving all of an imposed sentence is a matter of legislative grace—it is neither a constitutionally guaranteed nor a God-given right." *Williams* v. *Patterson,* 389 F. 2d, 374 (10th Cir., 1968) held that the fact that the State prisoner was not given an opportunity to appear with counsel at the parole revocation hearing did not render the revocation invalid. That court proceeded to discuss *Mempa* v. *Rhay* (*supra*) and distinguished it from the case before it and added "We are not concerned with sentencing. No attack is made on the sentence or the procedures connected therewith." *Wilkerson* v. *Patterson,* 303 F. Supp. 665 (D. Col., 1969) held that a state inmate had no constitutional right to appointed counsel at a revocation of his parole hearing where neither deferred sentencing nor any of the other matters relating to the original criminal proceedings were considered. *Ernest* v. *Willingham,* 406 F. 2d 681 (10th Cir., 1969) held that where the federal parole board, in proceedings for the *revocation* of mandatory early releases of prisoners, allows financially able prisoners to retain counsel, it must also provide counsel for indigent prisoners. *U. S. ex rel Vance* v. *Kenton,* 252 F. Supp. 344 (D. Conn., 1966) related to an unusual set of facts wherein the Court determined that a lapse of 123 days between the defendant's request for a revocation of parole hearing by the federal parole board and the actual hearing held on same, was unreason-

able. In our case there are no such similar facts. In *Commonwealth* v. *Tinson*, 249 A. 2nd 549 (Pa. Sup. Ct. 1969), the court held that the absence of counsel to represent the petitioner at a recommitment hearing, which resulted in *revocation* of his parole and his return to the prison, denied him the constitutional right to counsel. These facts are also not present in our instant case. Finally, petitioner cites *Johnson* v. *Stucker*, 203 Kan. 253, *cert. den.* 38 U. S. Law Week 3173 (Nov. 10, 1969). This case is hardly helpful to petitioner's cause. In *Johnson*, the Supreme Court of Kansas held that the refusal of the State Parole Board and Probation to permit petitioner's counsel to be present at his parole revocation hearing was not a denial of due process nor was it a violation of any statutory enactment governing such proceedings. As indicated, this Court denied certiorari thereafter.

The above analysis of the decisions cited in petitioner's behalf amply demonstrates the failure to set forth a single case which in any way conflicts with the decisions of the New Jersey Court below. Despite this, the petitioner now seeks certiorari from this Court. Clearly, there is no conflict of decisions warranting review by this Court.

III

There is no Important Question of Federal Law

Petitioner alleges that New Jersey has a "statutory arrangement whereby it affords the right of counsel to those able to afford it, but withholds it to all indigent prisoners", which, he alleges, is unconstitutional. Such a general statement, standing alone and unexplained, might have some emotional appeal, but it loses all validity when one examines precisely what the statute involved does and does not provide.

First, the statute does not provide for counsel *at the hearing,* although the board may permit such appearance

if it wishes. Thus, this case does not involve a situation where New Jersey parole hearings are divided into two categories, namely, one group wherein inmates able to pay are represented by attorneys at the hearing espousing their causes, and another group wherein indigent inmates appear alone and unrepresented.

Secondly, even the matter of consideration of a brief or other legal argument on behalf of the prisoner is left entirely in the court's discretion.

Thus, the most that the State grants as a so-called "right" is that an inmate may consult with counsel before the hearing, and even then, only where he "feels that his legal rights are invaded". The court below held this to mean "invasions which caused or contributed to his wrongful conviction or detention." It also held that "the brief contemplated by the statute must be one which deals with legal questions, not one which merely makes a plea of clemency." Finally, the court held that "the fact that a right to consult counsel was provided for at all would seem to stem more from a desire to insure that if a prisoner needed legal advice he would not be prevented from receiving it, than from a desire to establish a right to consultation with counsel as a part of the hearing procedure". Accordingly, the so-called "right to counsel" in New Jersey relating to parole hearings, as alleged by petitioner, actually relates to the very limited situation where a prisoner can seek prior legal advices and not to a situation wherein the inmate appearing before the parole board has the right to consult with counsel as an integral part of the hearing procedure.

Petitioner's theory is rested upon the rhetorical generalization that "when a man's freedom is at stake, a State-created right cannot be conditioned on his ability to pay for it". However, petitioner fails to cite one decision in support of same which relates to parole hearings but in-

stead, has cited the multitude of cases, covered in our Point II, which relates to various procedural rights which may or may not be afforded to a defendant at some stage of the criminal proceedings which ultimately leads to his imprisonment, or cases relating to revocation hearings, either probation or parole, which may ultimately lead to a man's reincarceration or resentencing. The distinctions between a mere parole hearing and the criminal proceedings referred to by petitioner are vital. A parole hearing is still essentially an administrative non-adversary hearing to determine whether a man will remain incarcerated or whether he will complete a portion of his sentence out in the community under supervision, based on a largely discretionary application of the administrative board's expertise.

In our case petitioner's "liberty" is not "at stake". His sentence has been imposed; he has been committed thereunder, and he is still imprisoned and has not completed serving the balance of his sentence. The adversary system has been terminated and the correction and rehabilitative processes of the penal system have been commenced. Thus, we are no longer concerned with the matter of sentencing or the procedures which lead to same. As stated in *Washington* v. *Hagan*, 287 F. 2nd 332 (3rd Cir., 1960) *cert. den.* 366 U. S. 970:

> "The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced, and if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised, we think there is no place for lawyer's representation and lawyer opposition in the matter of revocation of parole."

The closest analogy that petitioner can offer to the present situation relates to hearings for the revocation of parole, and not hearings relating to the initial grant of parole. However, even in the situations relating to the revocation of parole, courts have generally held that there is no federally protected constitutional right to counsel at a parole revocation hearing, and that any such right depends entirely upon the existence of statutory provisions. *Johnson* v. *Stucker, supra; Washington* v. *Hagan, supra; Hodge* v. *Markley*, 339 F. 2nd 973 (7th Cir., 1965). Also, see *Escoe* v. *Zerbst*, 295 U. S. 490 (1935) where this Court held:

> "Probation or suspension of sentence comes as an act of grace to one convicted of crime, and may be coupled with such conditions in respect of its duration as Congress may impose."

Another theory advanced by petitioner is that the attory representation is necessary because of the "wealth of factual material" considered by the Board. There are several answers to this. First, there is no adjudication of guilt or innocence, and ordinarily, no factual issues to be resolved such as would require the presence of counsel. In fact, under the New Jersey statute the board may parole *only* if it is of the unanimous opinion that there is a reasonably probability that if released "he will assume his proper and rightful place in society without violation of law, and that his release is not incompatable with the welfare of society." N.J.S.A. 30:4-123.14. Moreover, the three members of the parole board in New Jersey function in a manner to elicit from the inmate all of the informatoin that is deemed necessary for it to ascertain his fitness to rejoin society and there is no suggestion in this case that inmates are denied release because of lack of formal education or inability of expression. It is the job of the parole board to assist such inmates, and no sugges-

tion has been made that they do not. As stated in *Johnson* v. *Stucker, supra,* at p. 42:

> "Indeed, there is, to some extent at least, a genuine identity of interest, if not purpose in the prisoner's desire to be released—the board's policy being to grant release as soon as possible, consistent with public safety and the prisoner's own welfare and rehabilitation. The relationship of the board and the prisoner has been described as partaking of parens patriae."

Secondly, in a parole hearing, unlike a revocation hearing, there are no specific factual allegations concerning the conduct of a probationer or a parolee said to constitute a violation of his prior release, whether on probation or parole. In such case, there are no allegations of misconduct involved, and no necessity to present contrary evidence or to cross-examine adverse witnesses.

Petitioner alleges that the right to counsel can be of substantial value to the parole applicant "especially where, as here, there appears to have been allegations the applicant committed serious criminal acts in prison". This question is not involved in the present case, because the courts below found there were no such issues here, and actually found there was "no contention that the present case is in any way unusual". Furthermore, the parole applicant's prison conduct record is far less important than the conduct record of a parolee at a revocation hearing. In fact, N.J.S.A. 30:4-123.14 expressly provides that "no prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned while under sentence."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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